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Attn: Apple Chapman, Tim Sullivan, Christopher Williams
U.S. Environmental Protection Agency
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RE: Anadarko Petroleum Corporation Comments Regarding the U.S. Environmental Protection Agency's New Owner Clean Air Act Audit Program for Oil and Natural Gas Exploration and Production Facilities

Anadarko Petroleum Corporation ("Anadarko") timely submits the following comments regarding the U.S. Environmental Protection Agency's ("EPA's") "New Owner Clean Air Act Audit Program for Oil and Natural Gas Exploration and Production Facilities" (the "Proposed Audit Program"). On May 4, 2018, EPA announced on its website that it is in the process of developing a proposed audit program tailored for the oil and natural gas sector ("Audit Program"). *See* Renewed Emphasis on Self-Disclosed Violation Policies" (May 15, 2018).[1] EPA indicates that this is specific and tailored audit program will offer additional flexibilities and will make it easier for the regulated community to self-disclose, and correct violations. *Id.* As part of this new program, EPA has developed a "draft standard audit agreement" to be utilized by oil and gas operators seeking to use this CAA audit program ("Proposed Agreement").

Anadarko is among the world's largest independent oil and natural gas exploration and production companies, with nearly 6,000 wells operated in the US on Federal and Tribal lands, and nearly 1.5 million acres of Federal and Tribal minerals under lease. Anadarko has historically availed itself of various audit programs and has a vested interest in the development of a workable, flexible and appropriate audit program for upstream oil and gas facilities at the federal level. As a result, Anadarko is well-situated to understand the benefits, concerns and impediments to a comprehensive and effective self-audit program. Anadarko appreciates this opportunity to comment and respectfully requests EPA take the following practical, legal, and policy concerns into consideration before finalizing any Audit Program and accompanying agreement language.

[1] Available at https://www.epa.gov/sites/production/files/2018-05/documents/refreshannouncementfordisclosures.pdf.

I. Introduction

EPA's Audit Program for oil and natural gas exploration and production facilities properly acknowledges that environmental auditing plays a critical role in protecting human health and the environment. As EPA notes in the Proposed Agreement, self-audits significantly benefit the environment, as well as EPA and state agencies, by allowing companies to self-identify and correct actual or potential violations and employ measures to further prevent future violations of environmental laws and regulations. Self-audits are often used to assist operators in identifying actual or potential violations not only at a particular facility but across a host of its facilities and frequently enable an operator to identify systematic or similar types of issues across its operations regionally or otherwise.

Despite the general benefits of audit policies, historically, EPA's current audit policy has not been conducive to use by operators within the upstream oil and gas industry due to: (1) EPA requirement to disclose within 21 days of discovery (a framework that does not work well for audits of an extensive number of facilities); (2) EPA's requirement to take corrective action within 60 days or request within that timeframe an extension; (3) EPA's move away from "audit agreements" that allowed operators to conduct a company-wide or multi-facility audit over a significantly longer period (offering leniency in disclosure, reporting, and corrective action timelines); and (4) EPA's failure to ensure compatibility with state audit programs, among other considerations. Following EPA's recent "Oil and Natural Gas Roundtable" ("Roundtable") in Denver, Colorado on February 27-28, 2018, Anadarko understood that EPA would take steps to facilitate the use of EPA's audit policy by upstream oil and gas operators. Industry was in fact encouraged by the discussions at the Roundtable, and was eager to see a proposal from EPA that would contemplate the unique nature of upstream oil and natural gas operations (including multiple facilities owned and operated across various jurisdictions), streamline the audit process, incentivize self-evaluation of environmental compliance programs (company-wide), and offer the flexibility necessary to facilitate self-audits that will inherently vary in regulatory scope, number of facilities, and regional locations.

EPA's Proposed Audit Program and the Proposed Agreement did not achieve the goals and objectives shared by industry (and discussed with EPA) at the Roundtable, which focused on the need for flexibility. EPA's Proposed Audit Program and the Proposed Agreement is prescriptive, inflexible, and limited and could limit the ability of oil and gas operators to utilize EPA's proposed self-audit process. Through these comments, Anadarko raises specific concerns regarding the concepts, frameworks, and proposed language set forth by the Proposed Audit Program and in the Proposed Agreement. Anadarko addresses each of its concerns in turn.

II. Comments on the CAA Audit Program and Proposed Agreement

A. Scope of Facilities Covered by the Audit: Need for Flexibility

As currently structured two threshold concerns merit comment. First, the scope of the facilities covered. The Proposed Agreement, is available only to those operators that have recently acquired *upstream* facilities from another operator. While this certainly is one scenario where the audit program could be fruitfully applied, it is limited. Anadarko encourages EPA to work with the oil and gas industry, continuing to have conversations, which will guide improvements to the audit program and promote increased usage of audits for existing oil and gas upstream facilities as well as midstream facilities. However, Anadarko is not supportive of use of the Proposed Agreement in these setting for the reasons described below.

Flexibility in deciding the scope of an audit should be left to the operator. The scope of audits historically has been and should continue to be determined by the regulated entity, particularly in light of the voluntary nature of self-audits. On May 15, 2018, EPA published a "Renewed Emphasis on Self-Disclosed Violation Policies" online, where it articulates EPA's "priority to address noncompliance in an efficient and timely manner, applying a broad range of enforcement and compliance tools" and announced "a renewed emphasis on encouraging regulated entities to voluntarily discover, promptly disclose, expeditiously correct, and take steps to prevent recurrence of environmental violations." The voluntary nature of EPA's audit policy has been the bedrock of the EPA audit policy from the beginning. *See e.g.,* EPA's 1997 "Audit Policy Interpretive Guidance" (emphasizing throughout its 62 pages that an audit must be "voluntarily" completed); EPA 2000 Audit Policy Update (65 Fed. Reg. 19, 618 (April 11, 2000)) (stating that "[t]he revised Policy reflects EPA's continuing commitment to encouraging voluntary self-policing while preserving fair and effective enforcement;" EPA's Small Business Compliance Policy (65 Fed. Reg. 19,630 (April 11, 2000)); and EPA's New Owner Policy (73 Fed. Reg. 44,991 (Aug. 1, 2008)). This leads us to the concern that a policy dictating the scope of an audit (whether related to a transaction, or pertaining to existing versus newly acquired facilities) serves as a disincentive.

Flexibility in performing additional audits and incorporating additional facilities into the audit is necessary. A means to offer that flexibility would be through changes to Paragraph 7 of the Proposed Agreement. Through this and other provisions, the operator should (1) be able to enter into an entirely new audit agreement for newly acquired facilities (at its election), and, (2) if the number of facilities acquired subsequent to entering into the Proposed Agreement is sufficiently small and the operator desires to include them in an existing audit agreement, that should also be allowed as long as the operator agrees to meet the terms of the existing audit agreement. Importantly, there should not be any notion that operators are limited to one audit agreement for their facilities, regardless of when those facilities are acquired or where those facilities are located. Conducting an audit in a particular region should not trigger a requirement to audit a facilities of that company located in a different

region. In its 1997 Audit Policy Interpretive Guidance, EPA "encourages the conduct of intensive company-wide or multi-facility audits," but also recognizes that "a consolidated reporting arrangement may take many forms depending on the duration and scope of the proposed audit." *See* Audit Policy Interpretive Guidance, at 3.

B. Scope of Regulatory Requirements Covered by Audit

The Proposed Agreement refers only to compliance with the Clean Air Act, its implementing regulations, and federally-approved and enforceable requirements of applicable State Implementation Plans (SIPs). With such confines, EPA is limiting the scope of regulatory regimes for which an operator can utilize the Proposed Agreement to only those related to air quality. Other environmental regimes that may be (and often are) audited (at the operator's election), include Safe Drinking Water Act compliance, Clean Water Act compliance, and Emergency Community Right-to-Know Act compliance. EPA should not limit the statutes for which the audit may apply.

C. Audit Requires Use of a Proposed Agreement

Anadarko cautions use of a Proposed Agreement that imposes requirements that are drawn from recently executed Consent Decrees and Compliance Orders on Consent. In fact, many requirements in the Proposed Agreement seem to mimic unique terms imposed as injunctive relief executed under consent decrees with EPA and Colorado (collectively, the "Consent Orders"). These include imposing the requirements that are tied to specific deadlines such as: performing a design analysis, conducting a field survey, following specific corrective action guidelines; and reporting and recordkeeping requirements among others. In fact some of the language similarities appear to be direct quotations. Utilizing Consent Decree terms that were formulated as injunctive relief, under unique factual circumstances, and pursuant to a specific state's regulatory provision directly contradicts EPA policy of this Administration. *See* MEMORANDUM FROM E. SCOTT PRUITT TO ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS, OFFICE OF GENERAL COUNSEL (October 16, 2017) Borrowing language from the Consent Orders (whether federal or state) inherently dis-incentivizes operators from engaging in what should be a voluntary, flexible, and company-specific self-audit program.

Anadarko notes that EPA has expressed its intention to supplement the audit program broadly, inclusive of the 1997 audit policy interpretative guidance. *See* Renewed Emphasis on Self-Disclosed Violation Policies" (May 15, 2018). While Anadarko supports EPA to streamline the audit programs, add efficiencies and elements to encourage use, should sector-specific programs follow an effort to rectify complications with the existing general audit policy?

Anadarko recommends removal of Appendix B to any final Audit Program. EPA's incorporation of Appendix B into the new audit agreement attempts to transform the voluntarily audit

process to create new "regulation" without proper rulemaking.

D. Loss of Audit Benefits under the Proposed Agreement

To take advantage of the Audit Program an operator must waive its rights to a judicial or administrative hearing "on any issue of law or fact that has arisen or *may arise* . . ." in relation to the self-disclosure. Proposed Agreement at 16 (emphasis added). EPA may also proceed with any violations found outside the scope of the Proposed Agreement or if EPA receives "information" that "demonstrates the fact are other than as certified" in the operator's report, EPA can pursue enforcement. Id. at 23. Here, EPA introduces subjectivity into the Proposed Agreement that threatens the entire benefits and value of the agreement to an operator.

Furthermore, EPA's Proposed Agreement states that should EPA receive information that proves or demonstrates that the facts are other than as certified by the operator in its Final Report, the portion of the audit agreement pertaining to that information may be voided or EPA may void the entire agreement, at its own election. This exceptionally broad discretion afforded to EPA in assessing the sufficiency of the audit undermines the certainty that the Audit Program is intended to offer the operator. For example, if an operator, constrained by the timing allotted, notice requirements and up-front identification of all facilities, overlooks a fact or find an error of fact, the operator will be subject to enforcement despite the best intentions and efforts of the operator. This creates a monumental risk to an operator and discourages use of the Audit program. EPA should not be allowed to utilize one piece of misinformation or inaccuracy (often times unknown and unintentional) as the basis for voiding the entire agreement. This raises the a fundamental question if an "agreement" is the proper tool as a public policy matter to encourage participation in an audit program. Requiring entities to enter into an onerous agreement will not encourage use of the audit policy.

E. Withdrawal from the Audit and Transfer of Facilities

Paragraphs 3 and 5 of the Proposed Agreement suggest that in order to utilize the Proposed Audit Program for newly acquired facilities, an operator may not halt the audit process prior to completion. In light of the voluntary nature and perceived incentive to perform audits, it seem counterintuitive for EPA to dictate the audit process. An operator should be able to elect to terminate an audit at any time with respect to one or all of the facilities. If an operator terminates the audit, the operator forfeits the benefits afforded under the policy. This is a decision that the operator should be allowed to determine for itself.

Similarly, while Anadarko agrees that any final Audit Program could require notice of transfer of a facility covered by the Proposed Agreement under Paragraph 20 (Transferability), Anadarko does not agree that such notice must be provided prior to any proposed transfer of ownership or operation of

the facility. In many cases, transfers of assets are confidential and maintained as confidential until closing. Additionally, EPA has no authority to prevent the transfer and thus has no basis for requesting notice prior to transfer. This requirement seems to mimic unique terms imposed as injunctive relief executed under consent decrees with EPA and Colorado (collectively, the "Consent Orders"). As stated above utilizing Consent Decree terms that were formulated under unique circumstances as injunctive relief, contradicts the established EPA policy of this Administration. See Memorandum from E. Scott Pruitt to Assistant Administrators, Regional Administrators, Office of General Counsel (October 16, 2017).

With respect to providing notice of a transfer of more than a 50% equity interest in a business that owns or operates a facility subject to the Proposed Agreement (under the same Paragraph 20), EPA only needs to know if a particular facility is no longer included in the audit agreement – it cannot and should not insert itself into the corporate business dealings of a company undertaking a voluntary audit. Transfer provisions (again similar to those found in the Consent Orders) are simply not appropriate here.

F. Relationship to State Audits, State Regulations, and State Agencies

EPA should structure this proposed Audit Program as secondary to state programs. If an operator has no state program to follow then the operator can use this EPA Audit Program. The Audit Program should also explicitly provide that EPA shall not take enforcement action against an operator that disclose noncompliance under a state program. The CAA empowers the states to serve as stewards of their environment and Anadarko's proposed approach would support EPA's efforts to embrace cooperative federalism.

G. Restrictive Timetables

1. Time Period for Entry of Audit

In Paragraph 4, the Proposed Agreement describes the time period by which the Proposed Agreement must be executed in order for an operator to avail itself of the agreement. EPA ties that timeframe to the "date of acquisition." EPA has defined "date of acquisition" as the date on which the transaction closed and the operator acquired ownership or control of the facilities. However, in many cases, control of the facilities – such that an operator could conduct an audit – often comes some period of time after the transaction closes and the company acquires the assets. In those circumstances, the date of acquisition should be the date on which control of the facilities is transferred. Importantly, however, as discussed above, under Anadarko's proposal, this provision would be unnecessary because EPA would not limit the Proposed Agreement only to new owners.

2. Timeframe for Completing the Audit

Audits can take a significant amount of time depending upon the jurisdiction, the records that need to be evaluated and reviewed, the scope of facilities, and the time period under review. Timeframes for completion of the audit should not be dictated. Attempting to conduct an audit too rapidly could result in an incomplete audit, an inadequate amount of time to review the systems employed by the operator, and an incomplete or less comprehensive result. Timing is particularly important in the context of oil and gas upstream. Audits can include hundreds of facilities that can have tens of thousands of records covering the audit period (which frequently is a five-year period to coincide with the Clean Air Act's statute of limitations).

3. Completion of Corrective Action

The Proposed Agreement's requirement to either complete corrective action within 60 days or request an extension within 60 days presents one of the most difficult challenges of the existing EPA audit policy, including the new owner policy.

In many cases, 60 days is an insufficient amount of time to complete all corrective actions due to company resources, consultant availability, and equipment availability. Furthermore, given the vast number of facilities often covered under a self-audit in the exploration and production sector, this 60 day requirement creates an untenable rolling requirement to either ensure completion or to submit a request for extension. Additionally, in many cases, a permit may be required and the only action that an operator can take is to submit the application. However, it may take some time to actually receive the permit. If an operator can submit the permit within the relevant timeframe, it should not have to notify EPA that corrective action has not yet been achieved. In fact, many states request that operators submit permit applications, emissions notices, or notices of information on a planned schedule

Appendix B contains requirements that must be corrected before the Audit Program ends. Many of the requirements in Appendix B are not appropriate because (1) they contain requirements directly drawn from state or EPA Consent Decree in contradiction to current EPA policy; (2) such requirements are unachievable given the limited timing allotted for corrective actions. For example, Design and modification of facilities can take a significant amount of time. As proposed, operators would be attempting to complete the audit itself (which includes a broad range of regulations for review), as well as completing development of modeling guidelines, design analysis, modification, field surveys and verification. This compounds the framework of the audit substantially and will require significantly more time to complete – upwards of two years even for a modest number of facilities.

H. Immediate and Substantial Endangerment

The audit policy should be clear that identification of emissions in excess of emissions limits or permit limits alone is not evidence of immediate and substantial endangerment to public health or welfare or the environment. Furthermore, the terms "immediate and substantial endangerment to public health or welfare or the environment" are consistently found within the Consent Orders (e.g., PDC Consent Decree, Noble Consent Decree). As stated above, such language is not appropriate in a voluntary self-audit. Incorporation of this provision converts this Proposed Agreement from a voluntary agreement to something more akin to a settlement agreement.

I. Recordkeeping and Reporting Requirements

Appendix C contains an extensive description of the recordkeeping and reporting required that goes beyond records being kept for the audit. Such a prescriptive and extensive recordkeeping that exceeds regulatory programs creates a disincentive to participation. The scope of EPA's "summary of compliance information" goes far beyond the bounds of an audit policy, creating significant resource burdens for industry operators hoping to take advantage of the Proposed Audit Program. Specifically, EPA would require the entity seeking to use the Audit Agreement to compile and report on the "cost of returning to compliance (e.g., internal staff or outside consultants' time to become familiar with the regulations, preparing forms and/or permits, submitting forms and/or forms to appropriate agencies, fees collected by the state or other regulatory agencies, and start-up costs for plan implementation or tank monitoring). This type of reporting has never been contemplated by or required by EPA (and even most state) audit policies, and taking this approach could significantly deter operators from employing the audit program. Additionally, EPA would require an operator to provide the "estimated amount of pollutants reduced by all corrective actions." This is simply not a reasonable request, and similar to the above, does not offer value or otherwise further assist an operator identifying and resolving compliance concerns.

J. Certification Requirement

EPA's proposed certification requirements in Paragraph 26 of the Proposed Agreement go beyond EPA's historic practices with respect to audit policy certifications and would have a chilling effect on use of the Proposed Agreement for audits. Anadarko recognizes that certifications have been integral to the audit process for some time. Those certification requirements, however, have been limited in scope and generally relate to certifying that (1) an operator has satisfied audit policy criteria (and therefore qualify for the benefits of the audit policies), or (2) an operator has completed the corrective actions that it said it completed to remedy the actual or potential violations.

> Most public comments about the certification issue advised that any required certifications not be so burdensome or complex as to chill new owners' interest in coming forward to the government. The eligibility criteria above are clear and straightforward, and the certification will simply be included along with the certifications made by the self-disclosing entity that all Audit Policy conditions, as applied to new owners, have been met. This approach is designed to be sufficiently uncomplicated and manageable, while seeking to ensure that only appropriate new owners benefit from the Agency's Interim Approach.

73 Fed. Reg. at 44,996 (Interim New Owner Policy).

In contrast, EPA's proposed certification language in the Proposed Audit Program would in fact "chill" new owners' (and existing owners if made available to existing facilities) interest in participating in the audit program. EPA's proposed certification would require a responsible corporate official to certify to the following statement:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Here, EPA is asking a responsible official certify that the process for gathering audited information was "proper", and that <u>all</u> information gathered and submitted is true, accurate and complete. Where the spirit of an audit program should enable transparency, sharing of information, and open lines of communication, this certification as currently structured will deter utilization of EPA's Proposed Audit Program.

III. Conclusion

In conclusion, if EPA approves an audit program as proposed, the traditional and practical operation of self-audits for upstream oil and gas operations—and specifically related to the Clean Air Act context—would be seriously impaired. It is simply not realistic, and not workable to roll out such a prescriptive and limited self-audit process in a diverse, unique, and ever-changing industry. In fact, because of the apparent significant disconnect between EPA's current proposal, and industry's expectations with respect to an "improved" audit process for upstream oil and natural gas, Anadarko respectfully requests EPA again convene a discussion forum to truly understand the limitations of

EPA's Proposed Audit Program. Anadarko requests that EPA take the aforementioned practical, legal, and policy concerns into consideration before moving forward with any final audit program.

Thank you for the opportunity to provide comments on the proposed Audit Program and Audit Agreement.

Sincerely,

Anadarko Petroleum Corporation

William W. Grygar II

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cc: Julia A. Jones, J.D./M.S.E.S., Anadarko Petroleum Corporation